LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 20 1957
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 679

AROLD H. RIPPERGER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

R. CARLETON SHARRETTS, JR.,
1427 Munsey Building,
Baltimore 2, Maryland,
Attorney for Petitioner.

INDEX

TABLE OF CONTENTS

	PAGE
PETITION FOR WRIT	1
OPINION BELOW:	
Court of Appeals	43
JURISDICTION	2
QUESTIONS PRESENTED:	
Background and preliminary information	2-3
Question No. 1 — Denial of Due Process	4
Question No. 2 — Denial of Due Process	4
Question No. 3:	
(a) Court of Appeals Decision conflicts with other circuits	4
(b) Question of federal law which should be decided by Supreme Court	5
(c) Court of Appeals Decision conflicts with Decisions of Supreme Court	5
(d) Need for exercise of Supreme Court's power of supervisions	5
STATUTES INVOLVED	5
STATEMENT OF THE CASE	13
REASONS FOR GRANTING THE WRIT:	
(1) Denial of Due Process of Law	17
(2) Federal Law Question Must be Settled	20
(3) Conflict with decisions of Supreme Court	23
(4) Conflict with other circuits	23
(5) Necessity of Supreme Court's Supervision:	
(a) Evil intent not established	24
(b) Willfullness Without Evil Motive	25

PAGE

(c) Defendant was required to prove himself innocent 25

ARGUMENT:

I. Denial of Right to Appear with Counsel at Conference in Intelligence Division resulted in denial of Due Process of Law 29

II. Special Agent's Recommendation for prosecution of Defendant, prior to completion of investigation, and other defaults in Administrative Procedures Result in Denial of Due Process of Law 32

III. (a) Court of Appeals Decision is in Conflict with other Circuits 38

(b) Important question of Federal Law should be decided by Supreme Court 40

(c) Court of Appeals Decision is in conflict with Supreme Court Decisions 41

(d) Need for Supreme Court's power of supervision 41

CONCLUSION 42

TABLE OF AUTHORITIES

Cases

Block v. United States (1955), 221 F. 2d 786 23, 40

Hall v. Johnson (1937), 91 F. 2d 363 35

Hargrove v. United States (1933), 67 F. 2d 820 23, 38, 40

Haskell v. United States, 241 F. 2d 790 23, 40

Lipke v. Lederer (1922), 259 U.S. 557, 42 S. Ct. 549 33

McNabb, et al. v. U. S., 318 U.S. 332 37

Morgan v. United States (1938), 58 S. Ct. 773; Rehearing denied, 58 S. Ct. 999; Reversed on other grounds, 59 S. Ct. 795 and 61 S. Ct. 999 34

Morrissette v. U. S., 342 U.S. 246, 72 S. Ct. 240 23

Shapiro v. United States, 335 U.S. 1 31

PAGE

Spies v. United States (1943), 317 U.S. 493, 63 S. Ct. 364 21, 24, 41

United States v. Murdock (1933), 290 U.S. 309, 54 S. Ct. 223 23, 24, 38, 40, 41

Yarborough v. United States, 230 F. 2d 56 23, 39, 40

Statutes

Internal Revenue Code (1939):

Sec. 145(a) 2, 5, 13, 22, 26, 27

Sec. 145(b) 5, 21, 22, 26, 27, 28

Internal Revenue Code (1954):

Sec. 3401(e) 6

Sec. 3402(a) 6

Sec. 3402(f) 6

Sec. 3403 7

Sec. 6011(b) 7

Sec. 6051(a), (c), (d) 8, 9

Sec. 6161(b) 9

Sec. 6201(a); (a)(1) 10

Sec. 6204(a) 10

Sec. 6513(b) 10

Sec. 6651(a) 11

Sec. 6653(a) 11

Sec. 6653(b) 11

Sec. 7201 12, 21, 22

Sec. 7203 2, 12, 13, 22, 26

Sec. 7601(a) 12

Other References

American Bar Association Journal, November, 1957 34

Report of the Committee on Finance, United States Senate, 83d Congress, 2d Session Report No. 1622, page 147 20

PAGE

"Taxpayers' Right in Special Investigations", Bender, 15 Institute on Federal Taxation (N. Y. U.) 29

Progress Report, Subcommittee on Internal Revenue Taxation to the Committee on Ways and Means 37

Appendix to Appellant's Brief No. 7448 (filed in Court of Appeals, copies of which have been forwarded to the Supreme Court Justices. This Appendix contains all relevant and material testimony of government's witnesses and defendant, as well as Exhibits referred to herein.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

NO. ------

AROLD H. RIPPERGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Arold H. Ripperger prays that a Writ of Certiorari issue o review the Judgment entered in this case on October 21, 957, by the United States Court of Appeals for the Fourth ircuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for he Fourth Circuit is reported at F. 2d .[1]

The opinion of the United States District Court for the District of Maryland is set forth in Appellant's Appendix, pp. 33-36.[2]

[1] Appended to the Petition as Appendix A, is a copy of this *per uriam* opinion.

[2] References are to "Appendix to Appellant's Brief No. 7448", and will be cited herein as "(App.)."

JURISDICTION

The judgment sought to be reviewed was dated and entered by the United States Court of Appeals for the Fourth Circuit on October 21, 1957. An extension of time within which to file petition for writ of certiorari to and including December 20, 1957, was granted to defendant by Order of the Supreme Court dated November 20, 1957.

The jurisdiction of this court is invoked under Section 1254(1) of the Judicial Code; 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

There are several questions presented in this case which have not heretofore been ruled upon by the Supreme Court of the United States but which should be. In addition to such questions of first impression, there are additional questions presenting other special and important reasons for this court's review on writ of certiorari which will be set forth herein.

The prosecution of defendant in the District Court for the District of Maryland arose upon a criminal information being filed against defendant alleging willful failure to file income tax returns for the years 1953 and 1954, under Section 145(a), Internal Revenue Code of 1939; and Section 7203, Internal Revenue Code of 1954, respectively. Defendant entered a plea of not guilty and elected to be tried by the court without a jury. He was convicted on both counts of the criminal information and was sentenced to three months' imprisonment.

In the course of the investigation of his tax liability, defendant supplied the agents of the Internal Revenue Service with complete and accurate statements of his income received during the years involved; and also gave said agents a full statement under oath in which statement he

explained his reasons for not filing his income tax returns on time. Thereafter, and when the government's investigation was nearing completion, defendant was advised in writing by the Chief of the Intelligence Division of the Internal Revenue Service of his right to appear with counsel at the usual final conference which is held prior to the completion of the investigation by Internal Revenue Service, and is normally granted by the Intelligence Division to taxpayers in such cases. Defendant advised the Intelligence Division of his desire to appear at such final conference and a definite time therefor was set.

However, before such final conference was held, defendant was advised by the special agent of the Intelligence Division who was in the process of investigating defendant's tax liability, that the conference had been cancelled. No reason or explanation for such action was given to defendant.

Defendant was therefore denied the opportunity to appear at the conference arranged for him, as above set forth, with counsel prior to the completion of the investigation of his tax liability by the Intelligence Division of the Internal Revenue Service. Thereafter, the same special agent of the Intelligence Division who cancelled the conference granted to defendant by the Chief of the Intelligence Division, and who was the special agent who worked on defendant's investigation, made an affidavit that "he is satisfied that there is probable cause to believe that the said (defendant) . . . did willfully and knowingly fail to make said income tax returns. . . ." On the basis of said affidavit, the U. S. Attorney issued a criminal information resulting in the prosecution and conviction of defendant.

QUESTION NO. 1.

Was the denial by a special agent of the Intelligence Unit of Internal Revenue Service of the right of defendant to appear with counsel at the usual final conference which is held in the Intelligence Division of Internal Revenue Service prior to the completion of its investigation of defendant (at which time the Intelligence Unit was considering the recommendation for criminal prosecution of defendant) after said right to appear with counsel had been granted to defendant by the Chief of the Intelligence Unit, a denial of due process of law requiring a reversal of defendant's conviction?

QUESTION NO. 2.

Where a Special Agent of the Intelligence Unit of Internal Revenue Service, *prior to the completion of his investigation*, makes affidavit that "as a result of this investigation, he is satisfied that there is probable cause to believe that the said (defendant) . . . did willfully and knowingly fail to make said income tax returns . . .," and on the basis of which affidavit the U. S. Attorney issued a criminal information resulting in the prosecution and conviction of defendant, does such procedure in the Treasury Department constitute such flagrant disregard of rights of individuals and abuse of administrative procedure as to result in a denial of due process of law requiring a reversal of defendant's conviction?

QUESTION NO. 3.

Does the action of the Court of Appeals in adopting the Opinion of the District Court:

(a) Result in rendering a decision in conflict with the decision of another court of appeals on the same matter?

(b) Result in deciding an important question of federal law which has not been, but should be, settled by this Court?

(c) Result in deciding a federal question in a way in conflict with applicable decisions of this Court?

(d) Result in departing from the accepted and usual course of judicial proceedings, or so far sanctioning such a departure by a lower court as to call for an exercise of this Court's power of supervision?

The Petitioner maintains that all three questions, including all parts of Question No. 3, should be answered in the affirmative.

STATUTES INVOLVED

Sec. 145(a) (1939 Internal Revenue Code):

"Failure to file returns, submit information, or pay estimated tax or tax. Any person required under this chapter to pay any estimated tax or tax, or required by law or regulations made under authority thereof to make a return or declaration, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any estimated tax or tax imposed by this chapter, who willfully fails to pay such estimated tax or tax, make such return or declaration, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the cost of prosecution."

Sec. 145(b) (1939 Internal Revenue Code):

"Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax

imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Sec. 3401(e):

"NUMBER OF WITHHOLDING EXEMPTIONS CLAIMED. — For purposes of this chapter, the term 'number of withholding exemptions claimed' means the number of withholding exemptions claimed in a withholding exemption certificate in effect under section 3402(f), or in effect under the corresponding section of prior law, except that if no such certificate is in effect, the number of withholding exemptions claimed shall be considered to be zero."

Sec. 3402(a) INCOME TAX COLLECTED AT SOURCE:

"REQUIREMENT OF WITHHOLDING. — Every employer making payment of wages shall deduct and withhold upon such wages (except as provided in subsection (j)) a tax equal to 18 percent of the amount by which the wages exceed the number of withholding exemptions claimed, multiplied by the amount of one such exemption as shown in subsection b(1)."

Sec. 3402(f):

"WITHOLDING EXEMPTIONS.—

"(1) IN GENERAL — An employee receiving wages shall on any day be entitled to the following withholding exemptions:

"(A) an exemption for himself;

"(B) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(e)(1)

(relating to old age) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

"(C) one additional exemption for himself if, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(d)(1) (relating to the blind), for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

"(D) if the employee is married, any exemption to which his spouse is entitled, or would be entitled if such spouse were an employee receiving wages, under subparagraph (A), (B), or (C), but only if such spouse does not have in effect a withholding exemption certificate claiming such exemption; and

"(E) an exemption for each individual with respect to whom, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable an exemption under section 151(e) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit."

Sec. 3403. LIABILITY FOR TAX:

"The employer shall be liable for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any payment."

Sec. 6011(b):

"IDENTIFICATION OF TAXPAYER. — The Secretary or his delegate is authorized to require such information with respect to persons subject to the taxes imposed

by chapter 21 or chapter 24 as is necessary or helpful in securing proper identification of such persons."

Sec. 6051(a):

"REQUIREMENT. — Every person required to deduct and withhold from an employee a tax under section 3101 or 3402, or who would have been required to deduct and withhold a tax under section 3402 if the employee had claimed no more than one withholding exemption, shall furnish to each such employee in respect of the remuneration paid by such person to such employee during the calendar year, on or before January 31 of the succeeding year, or, if his employment is terminated before the close of such calendar year, on the day on which the last payment of remuneration is made, a written statement showing the following:

"(1) the name of such person,

"(2) the name of the employee (and his social security account number if wages as defined in section 3121(a) have been paid,

"(3) the total amount of wages as defined in section 3401(a),

"(4) the total amount deducted and withheld as tax under section 3402,

"(5) the total amount of wages as defined in section 3121(a), and

"(6) the total amount deducted and withheld as tax under section 3101.

In the case of compensation paid for service as a member of a uniformed service, the statement shall show, in lieu of the amount required to be shown by paragraph (5), the total amount of wages as defined in section 3121(a), computed in accordance with such section and section 3121(i)(2)."

Sec. 6051(c):

"ADDITIONAL REQUIREMENTS. — The statements required to be furnished pursuant to this section in respect of any remuneration shall be furnished at such

other times, shall contain such other information, and shall be in such form as the Secretary or his delegate may by regulations prescribe."

Sec. 6051(d):

"STATEMENTS TO CONSTITUTE INFORMATION RETURNS. — A duplicate of any statement made pursuant to this section and in accordance with regulations prescribed by the Secretary or his delegate shall, when required by such regulations, be filed with the Secretary or his delegate."

Sec. 6161(b):

"AMOUNT DETERMINED AS DEFICIENCY. — Under regulations prescribed by the Secretary or his delegate, the Secretary or his delegate may extend, to the extent provided below, the time for payment of the amount determined as a deficiency:

(1) In the case of a tax imposed by chapter 1 or 12, for a period not to exceed 18 months from the date fixed for payment of the deficiency, and, in exceptional cases, for a further period not to exceed 12 months.

(2) In the case of a tax imposed by chapter 11, for a period not to exceed 4 years from the date otherwise fixed for payment of the deficiency.

An extension under this subsection may be granted only where it is shown to the satisfaction of the Secretary or his delegate that the payment of a deficiency upon the date fixed for the payment thereof will result in undue hardship to the taxpayer in the case of a tax imposed by chapter 1, to the estate in the case of a tax imposed by chapter 11, or to the donor in the case of a tax imposed by chapter 12. No extension shall be granted if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax."

Sec. 6201(a) ASSESSMENT AUTHORITY:

"AUTHORITY OF SECRETARY OR DELEGATE. — The Secretary or his delegate is authorized and required to make the inquiries determinations, and assessments of all taxes (including interest, additional amounts, additions to the tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, which have not been duly paid by stamp at the time and in the manner provided by law. Such authority shall extend to and include the following:

(1) TAXES SHOWN ON RETURN. — The Secretary or his delegate shall assess all taxes determined by the taxpayer or by the Secretary or his delegate as to which returns or lists are made under this title."

Sec. 6204(a):

"GENERAL RULE. — The Secretary or his delegate may, at any time within the period prescribed for assessment, make a supplemental assessment whenever it is ascertained that any assessment is imperfect or incomplete in any material respect."

Sec. 6513(b):

"PREPAID INCOME TAX. — For purposes of section 6511 or 6512, any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31. For purposes of section 6511 or 6512, any amount paid as estimated income tax for any taxable year shall be deemed to have been paid on the last day prescribed for filing the return under section 6012 for such taxable year (determined without regard to an extension of time for filing such return)."

SEC. 6651(a):

"ADDITION TO THE TAX. — In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate."

SEC. 6653(a):

"NEGLIGENCE OR INTENTIONAL DISREGARD OF RULES AND REGULATIONS WITH RESPECT TO INCOME OR GIFT TAXES. — If any part of any underpayment (as defined in subsection (c)(1)) of any tax imposed by subtitle A or by chapter 12 of subtitle B (relating to income taxes and gift taxes) is due to negligence or intentional disregard of rules and regulations (but without intent to defraud), there shall be added to the tax an amount equal to 5 percent of the underpayment."

SEC. 6653(b):

"FRAUD. — If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a)."

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

SEC. 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS:

"(a) GENERAL RULE.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed."

STATEMENT OF THE CASE

This Petition for Writ of Certiorari is filed by Arold H. Ripperger whose conviction by the U. S. District Court for the District of Maryland of willful failure to file income tax returns for the years 1953 and 1954, under Section 145(a) of the Internal Revenue Code of 1939, and Section 7203 of the Internal Revenue Code of 1954, respectively, was affirmed by the Court of Appeals for the Fourth Circuit in a *per curiam* opinion dated October 21, 1957.

Defendant is 37 years of age, married, and the father of three children. He resides in Baltimore County, Maryland, and practices law in Baltimore City.

On or about November 18th, 1955, defendant called at the office of Intelligence Division of the Baltimore District Director of Internal Revenue as a result of a letter directed to him concerning the filing of income tax returns. At the time of this visit to the Intelligence Division, an interview of defendant under oath, was had and was reduced to writing and filed in the criminal court case as Government's Exhibit No. 1 (App. 41). In this interview, or more logically, in this statement, defendant forthrightly and candidly explained his reasons for not filing his income tax returns for the years involved on time.

Subsequently, defendant prepared schedules of his income for the years involved and submitted same to Special Agent Haspert, which schedules Special Agent Haspert found to be correct (App. 6, 7, 8). On the basis of these schedules, Revenue Agent Wheeler, who worked on the case with Special Agent Haspert, computed *deficiencies* in income tax due by defendant (App. 11). Part of defendant's income tax for each of the years involved had been paid through the withholding of taxes by defendant's employers (App. 11). Income taxes had been withheld by defendant's

employers and Forms W-2 (tax withheld) had been filed with the District Director of Internal Revenue for each year involved under instructions from defendant to his employers to do so (App. 13, and defendant's Exhibit No. 1, App. 47).

Defendant knew that the Forms W-2 went to the District Director's office where he should file his returns and pay his taxes (App. 16). Defendant was of the opinion that thereafter an account was set up in his name in the collector's office as a result of the filing of Forms W-2 (App. 28). Defendant told the agents during the investigation that he was aware of the fact that he had sufficient income in the years involved to require the filing of returns on which there would be some tax liability; but at the time returns and taxes were due he did not have the funds available for the payments. Defendant's law practice was not steady and he told the agents that he was looking to the development thereof to the point where he could clean up all the obligations at once (App. 45, 46). During each of the years involved herein, defendant had a part-time job as church organist and choir director.

Defendant was never under the impression that he was responsible criminally because of his failure to file returns, although during the investigation he was made aware of it by the agents of the Internal Revenue Service (App. 17).

During the course of the investigation of his tax liability by the Intelligence Division, defendant received a letter dated June 4, 1956, from the Chief of the Intelligence Division notifying defendant that the investigation was "nearing completion", and because consideration was being given to the possible recommendation that criminal proceedings be instituted against defendant "it is deemed appropriate *to grant you a conference before final decision is*

made, at which time you may appear with counsel . . ." (Emphasis supplied.) (Def.'s Exh. No. 2-B, App. 50). A definite time for the conference was mentioned in the letter from the Chief of the Intelligence Division, but this date was postponed until the following week by agreement between Special Agent Haspert and defendant (App. 17). Prior to the date which had been set for the conference, Special Agent Haspert notified defendant that they weren't going to have the conference (App. 18).

Thereafter Special Agent Haspert made an affidavit on the basis of which the U. S. Attorney issued a criminal information charging defendant with willful failure to file income tax returns for the years involved. The signficant wording of Special Agent Haspert's affidavit is as follows:

> "As a result of this investigation he (Haspert) is satisfied that there is probable cause to believe that the said (defendant) . . . did willfully and knowingly fail to make said income tax returns . . ." (Record on Appeal, p. 3).

No reasons were cited by Special Agent Haspert for his belief that there was probable cause of defendant's guilt either in his affidavit (Record on Appeal, p. 3), or in his testimony given in Court (App. 5-8), unless the mere failure to file returns is in itself, with nothing more, considered as evidence sufficient to prove guilt of willfulness.

On April 22, 1957, defendant entered a plea of not guilty and was tried before the Judge of the U. S. District Court for the District of Maryland without a jury. A verdict of guilty on both counts of the Criminal Information was rendered by the Judge and defendant was sentenced to three months' imprisonment.

The government's case was based upon the testimony of three agents of the Internal Revenue Service — Special

Agents Carney and Haspert of the Intelligence Division; and Revenue Agent Wheeler. (A fourth witness testified only that he had been unable to locate income tax returns of defendant for the years involved.)

The testimony of these three government agents was so short that their testimony is set forth in full in defendant's brief (App. 1-12). The testimony of the three government agents discloses the following information, and no more: the full cooperation of defendant in giving his statement under oath; his full cooperation in preparing schedules of his income and furnishing the agents therewith; testimony as to the accuracy of said schedules; and testimony as to the computation of defendant's tax deficiency. There is no testimony from the government's agents of any specific act of willfulness, fraudulent conduct, tax evasion, evil intent or bad motive.

Defendant testified that he knew he had disclosed to the District Director of Internal Revenue in Baltimore his taxable status for the years involved by causing the payment of taxes to be made through the withholding method, and by the filing of W-2's and the opening of an account in his name as a result thereof in the Director's office (App. 13, 15, 16, 28). He stated he intended to pay the balance of his taxes (part thereof having been currently paid) and file his returns when he accumulated the money therefor (App. 26). In refraining from filing his returns on time, defendant relied upon two points, as follows: (1) the government's instruction sheet which states that the balance of the tax due "must be paid with your return"; and (2) the fact that he did not have sufficient funds to pay the tax when the returns were due (App. 25, 27, Def's. Exh. 6, Def's. Exh. 4). He did not have any intention of evading any taxes nor deceiving the collector as to the existence or extent of his tax liability (App. 26).

None of the defendant' testimony was disproved by the government; nor did any of the government's agents testify to facts contrary to defendant's testimony.

The prosecution was inaugurated by Special Agent Haspert's affidavit that he had "probable cause" to believe defendant was guilty of willful failure to file his income tax returns, but no facts were testified to by Haspert, nor any other government witness, to support the "probable cause" for such belief of defendant's guilt, other than the mere failure of defendant to file returns for the years involved.

The conclusions of the trial court that defendant "attempted to evade the payment of taxes" is not supported by any affirmative acts of tax evasion by defendant referred to by the court. Instead, the court specifically states that his conclusion is merely an inference (App. 34).

The conclusion of the trial court that defendant's failure to file his returns for the years involved was willful is not supported by a specific finding by the trial court of an evil intent of defendant.

As we will show later in the Argument in this Petition, the Court of Appeals, in adopting the opinion of the trial court, has denied due process of law to defendant and has made other determinations giving rise to special and important reasons for this Court to review this case on writ of certiorari, and which require a reversal of defendant's conviction.

REASONS FOR GRANTING THE WRIT

The Petition should be granted in this case because:

(1) Denial of Due Process of Law.

The defendant was precluded from appearing with counsel at the usual final conference granted to taxpayers dur-

ing the investigations of tax liability conducted by the Intelligence Division of the Internal Revenue Service. This serious deprivation of a recognized right of individuals to appear with counsel at conference or hearings before administrative bodies resulted from the unduly over-zealous, prejudicial, unwarranted and unexplained cancellation by a Special Agent of the Intelligence Division of a conference which had previously been arranged for defendant, and communicated in writing to him, by the Chief of the Intelligence Division. This conference was of extreme importance to defendant because, as was stated in the notice of the conference, a possible recommendation that criminal proceedings be instituted against defendant was being considered by the Intelligence Division. The Chief of the Intelligence Division stated that "it is deemed appropriate to grant (defendant) a conference *before final decision is made* (on the possible recommendation for criminal prosecution), at which time (defendant) could attend with counsel . . ." (Emphasis supplied.) (Def's. Exh. No. 2-B, App. 50). The evil which can be perpetrated by such over-zealous usurpation of authority and disregard of normal and recognized administrative procedures as occurred in this case, is evidenced by events taking place subsequent to the cancellation of the above-mentioned conference. The conference, pursuant to recognized normal administrative procedure in such cases, was to be held before the investigation of defendant's tax liability was completed. Moreover, the conference presumably was for the purpose of giving defendant or his counsel an opportunity to present evidence or arguments and thereby to prevent a recommendation being made by the Intelligence Division for criminal prosecution. However, following the cancellation of the above mentioned conference, the same Special Agent Haspert who cancelled the conference, also made an affi-

davit that "as a result of this investigation he is satisfied that there is probable cause to believe that the said (defendant)" is guilty of willful failure to file his income tax returns. It was on the basis of this affidavit that the U. S. Attorney filed the criminal information against Defendant. And it was on the testimony of the same Special Agent, together with the two other government witnesses, that defendant was prosecuted and convicted.[3]

In view of the anticipated increase in prosecutions for tax violations, according to figures released by the Department of Justice, this court, it is respectfully submitted, should grant a review of this case on writ of certiorari because of the apparent failure of defendant to secure due process of law which failure resulted from an unwarranted and unjustified act of, and a prejudicial usurpation of authority by an agent of the U. S. Treasury Department.

[3] Counsel for defendant has been informed that defendants, in cases such as this one, are normally given a copy of the criminal information when they appear in response to a Bench warrant; and counsel for defendant is given a copy thereof after he has entered his appearance in the case as defendant's attorney. This procedure was followed in this case, but neither the defendant, nor his counsel, were furnished copies of Special Agent Haspert's affidavit. It is believed that this failure to receive a copy of Haspert's affidavit was through inadvertence or oversight in the U. S. Attorney's Office. Neither defendant, nor his counsel, were aware of the existence of such affidavit until defendant's counsel was called to the U. S. Clerk's Office to examine the Record on Appeal immediately prior to its being forwarded to the Court of Appeals by the Clerk. It was on the occasion of his examination of the papers included in the Record on Appeal that defendant's counsel first had knowledge of the existence of Special Agent Haspert's affidavit which was attached to the original criminal information in this case. Because of these facts defendant had no knowledge of grounds on the basis of which the criminal information could be attacked at time of trial.

(2) Question of Federal Law Presented Which Should be Settled by this Court.

There is an important question of Federal law presented in this case which has not been, but should be, settled by this court in that the trial court adopted an hypothetical burden of proof in this case, and in so doing, has embraced a doctrine of law heretofore unknown in prosecutions for income tax violations.

As background of this point, defendant urged upon the trial court the following "Request for Instruction No. 23":

> "The Defendant respectfully prays the Court to instruct itself sitting as a jury that the Congressional intent expressed by Congressional Committees during their consideration of the 1954 Internal Revenue Code expressly states, in effect, that all criminal offenses under the Internal Revenue Laws are, in substance, attempts to evade tax, and the Court, sitting as a jury should consider such Congressional intent in determining whether the Government has met its burden of proof thereunder."

The basis for this Request for Instruction is the "*Report of the Committee on Finance, United States Senate, 83rd Congress, 2d Session, Report No. 1622,*" page 147, wherein Congress stated as follows:

> "In this chapter all criminal offenses are brought together, as are all other offenses. . . .
>
> "In general, uniform penalities are provided by the House bill instead of the varying penalties now provided for *what in substance is the same offense, namely, the attempt to evade tax. . . .*" (Emphasis supplied.)

In other words, it appears that Congress now requires proof by the government amounting to an attempt to evade tax in all prosecutions of criminal offenses under the In-

ternal Revenue Code. If that is so, then the government should be required to prove an "affirmative attempt" as this Court has defined such act in the *Spies* case (*Spies v. U. S.*, 317 U.S. 493, 63 S. Ct. 364 (1943)).

The trial court, however, apparently rejected defendant's "Request for Instruction No. 23" in the following finding:

> "It is not necessary for the government to prove in a case under Section 145(a) or 7203 that the defendant intended or attempted to evade or defeat the payment of taxes *permanently*." (App. 34) (Emphasis supplied.)

In lieu of defendant's requested instruction No. 23, the trial court stated the following hypothetical principal as its measure of the required burden of proof:

> "I do not think it is necessary for the government to prove in a case under 145(a) or 7203 that the defendant intended or attempted to evade the payment of taxes *indefinitely or at all*; but if the government did have such a burden I find that it was met in this case. (Emphasis supplied.)
>
> "That is a natural inference from the evidence in this case, and no other motive or purpose has been suggested" (App. 34).

It appears from the foregoing findings of the trial court, that the court has made a distinction in the law relating to tax evasion which the applicable statutes (Section 145(b), Internal Revenue Code of 1939; Section 7201, 1954 Internal Revenue Code) does not sanction, namely the distinction between "permanent" tax evasion, and tax evasion which is "indefinitely or at all."

The trial court obviously had some distinction in mind by virtue of the fact that it specifically made such distinction.

The court stated that the government did not have the burden of proving in a case under Section 145(a) or 7203 that the defendant intended or attempted to evade or defeat the payment of taxes permanently. Accordingly, the trial court did not find that the government had met such burden of proof. This latter burden, it is respectfully submitted, is the one contemplated by Congress in the application of Section 145(b), Internal Revenue Code of 1939, and Section 7201 of the Internal Revenue Code of 1954.

If the trial court means to say that the government did not prove a willful attempt to evade or defeat any tax, pursuant to the terms of the statute involved, but that the government did prove some lesser or temporary default on the part of defendant from which lesser default the trial court presumed that it was justified in drawing an inference of defendant's intent or attempt to evade tax — and there is some evidence that the court intended such distinction because the court stated that "this is not one of the most serious types of cases" (App. 39); and also stated that "this is not a case where the failure to file was because of any improper activity on the side or because the person was accumulating money and was trying to hide it away" (App. 37) — then the trial court has found that the government proved a crime which does not exist in the statutes and from which proof of such non-existent crime the court presumed that it could draw the conclusion that defendant intended or attempted to evade the payment of taxes from his mere failure to file returns.

That the trial court intended the government in respect of this issue, to be under a burden of proof amounting to something less than actual proof of an intent or attempt to evade the payment of taxes, as that criminal offense is defined by the statute (Sec. 145(b)), and applicable court

decisions, is apparent from the next reason assigned for the granting of this petition wherein it is shown that the trial court refrained from finding an evil motive on the part of defendant in respect of his failure to file income tax returns for the years involved herein.

(3) Court of Appeals Decision in Conflict With Decisions of This Court.

The adoption by the court of appeals of the U. S. District Court's opinion that proof of willfulness on the part of defendant had been met by the government, without a finding by the trial court also that defendant's failure to file his returns was due to an evil motive, or evil intent, is in conflict with the decision of this court in *U. S. v. Murdock*, 290 U.S. 309, 54 S. Ct. 223 (1933); *Morrissette v. U. S.*, 72 S. Ct. 240, 342 U.S. 246.

4. Court of Appeals Decision is in Conflict with other Courts of Appeals.

The adoption by the Court of Appeals of the U. S. District Court's opinion that proof of willfullness on the part of defendant has been met by the government, without a finding by the trial court also that defendant's failure to file his returns was due to an evil motive, or evil intent, or bad purpose, is in conflict with decisions, not only of the Fourth Circuit, but other courts of appeals as well, as follow:

(a) Fourth Circuit — *Yarborough v. United States*, 230 F. 2d 56;

(b) Fifth Circuit — *Hargrove v. United States*, 67 F. 2d 820 (1933);

(c) Ninth Circuit — *Block v. United States*, 221 F. 2d 786 (1955);

(d) Tenth Circuit — *Haskell v. United States*, 241 F. 2d 790.

(5) NECESSITY OF THIS COURT'S POWER OF SUPERVISION

In adopting the opinion of the U. S. District Court, the Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings by the lower court as to call for an exercise of this court's power of supervision.

There are a number of reasons for this, as follow:

(a) *Evil Intent Not Established*

The trial court found that defendant's failure to file his returns for 1953 and 1954 was willfull. However, a very careful and close examination of the trial court's opinion (App. 33-36) fails to disclose a finding by the trial court of an evil motive which this court held in the *Murdock* case (*supra*) to be an essential element of the offense.

It is significant that the court of appeals did not refer to a finding of evil motive made by the trial court in support of the latter's finding of willfulness.

The court of appeals in its *per curiam* opinion did state that the trial court had found that "an intent to evade taxes had been established."

The trial court, in its opinion, points to no evidence in the case to support the statement that an intent to evade taxes had been "established" other than that "that is a natural inference from the evidence in this case and no other motive or purpose has been suggested" (App. 34).

Moreover, reason No. 2 for granting the writ, above set forth, we respectfully submit, effectively disposes of the finding by the trial court of an intent to evade taxes. Certainly it cannot be maintained that such intent to evade "had been established," as the court of appeals stated was done, by applicable rules of law which this court has heretofor set forth (*Spies* case, *supra*).

(b) *Willfullness Without Evil Motive*

There is substantial evidence contained in the trial court's opinion that the court found willfullness without deeming it necessary to also find an evil motive.

Numerous requests for instructions were presented to the court by defendant in which requests, the question of evil motive was treated fully. Very few of defendant's requests for instructions were granted by the trial court. None of such requests, as to the necessity for proof by the government of an evil motive, was granted. At the conclusion of the trial court's opinion, the court stated that if defendant intends to take an appeal, "I will look over your requests for instructions . . ." (App. 35). However, the record in this case does not disclose specific rulings by the trial court on defendant's Requests for Instructions.

(c) *Defendant was Effectively called upon to Prove Himself Innocent*

The brief testimony of the government's witnesses at defendant's trial reveals a complete absence of any criminal conduct on the part of defendant, or conduct which would disclose evil intent, bad motive, intent to evade taxes, etc.

To make sure that his explanations were fully understood, defendant took the stand in his own behalf.

Virtually all references in the trial court's opinion to matters contained in the testimony adduced during the trial, relate to matters which were injected into the trial, not by the government's witnesses, who, though experienced revenue agents, apparently did not regard such matters of sufficient importance to comment upon in their testimony, but by the trial court when the court took defendant

over for questioning. The trial court, of course, has every right to question the defendant. However, the court's questions disclose undue emphasis, in arriving at its conclusions in this case, on matters such as estimated returns and quarterly payments which were never proved to have been due by defendant, and it is possible that such returns were not due by him. Defendant was not charged with any dereliction in connection therewith. The government's agents did not deem such matters sufficiently important to testify thereto. There is some evidence that defendant's failure to pay taxes of which he was not charged — weighed heavily in the trial court's conclusion of guilt, and may have been the reason for defendant's imprisonment (App. 38).

In connection with the trial court's finding that:

> "I do not think it is necessary for the government to prove in a case under 145(a) or 7203 that the defendant intended or attempted to evade the payment of taxes indefinitely or at all; but if the government did have such a burden, I find that it was met in this case" (App. 34),

a most astounding colloquy between court and defendant's counsel occurred during the direct testimony of defendant.

Defendant was asked by his counsel:

> "Q. Did you have any intention of evading any income taxes for the years 1949 through 1954? A. Not for any year and not for any time" (App. 26).

Before defendant could further pursue this line of defense negating intent to evade taxes, the trial court made the following observation to counsel:

> "(The Court) He is not charged with that. I mean he is not charged under 145(b)" (App. 26).

The court obviously felt at the time it made such statement that such intention to evade tax on the part of defen-

dant had not been proved up to that juncture of the proceedings — which was nearly at the end of the whole case. Clearly, no such evidence or testimony had been given by the government's witnesses. Defendant's counsel therefore abandoned this line of defense and questioned defendant along other lines.

Defendant's counsel was amazed to hear the court's findings quoted above in this sub-paragraph at the conclusion of the testimony in the case.

However, it appears that the court's finding that it is not necessary for the government to prove that defendant intended or attempted to evade or defeat the payment of taxes "permanently" (App. 34) is entirely consistent with the court's observation made to counsel, as above set forth, that the defendant "is not charged with that — I mean he is not charged under 145(b)" (App. 26).

These latter two statements by the trial court, that is, the conclusion that the government does not have to prove an intent, or attempt to evade the payment of taxes permanently, taken in conjunction with the court's observation that defendant was not charged under Section 145(b), reveals, inferentially at least, the trial court's view that in a failure to file prosecution (Section 145(a)), the government does not have to prove an intent or attempt to evade taxes under Section 145(b). And the trial court did not, in fact, make a finding that such intent or attempt to evade taxes had been proved.

Despite the trial court's refusal to find that such intent or attempt to evade taxes had been proved, the court of appeals states in its *per curiam* opinion that the trial court concluded that "an intent to evade taxes had been established".

Defendant testified at length in his own behalf. He vigorously denies harboring any willfullness, evil intent, bad purpose, attempt to evade taxes, etc. Defendant's testimony, and evidence introduced in support thereof, remain unimpeached. Defendant's explanation for failing to file his returns for the years involved was not "that he did not have the money to pay the income taxes due for the years and thought that he was not required to file returns when he did not have the money to pay the taxes due by him," as the court of appeals has summarized his defense. Instead, defendant's explanation is that he was aware that the law required him to file returns because of the amount of income he received, but that his delay in filing them was, in part, based upon his own erroneous construction of such requirement and was not due to any capricious, willfull, evil or fraudulent disregard of such requirement. Defendant's erroneous construction of the requirement for filing his returns was based upon facts proved to be accurate (namely, the lack of funds, etc). Defendant steadfastly testified that he always intended to file his returns and pay up the tax due when he had sufficient funds to do so. None of defendant's testimony was contradicted; none of the testimony of government's witnesses contradicted defendant's testimony. Even the trial court noted that the sincerity of character witnesses who appeared for defendant convinced the court of the regard in which the defendant is held in the community (App. 36).

Despite the failure of the government to produce proof of evil intent, which element is required to support a finding of willfulness; or proof of an intent or attempt to evade taxes; or proof of any other acts of a criminal nature on the part of defendant; and despite defendant's uncontradicted testimony and proof introduced negating evil intent and willfullness on his part; the trial court obviously dis-

regarded all of defendant's explanation made by him in his defense and presumed that it could draw an inference of an intent or attempt to evade the payment of taxes because "no other motive or purpose has been suggested" (App. 34).

It appears therefore that defendant had the burden of proving himself innocent of harboring an intent which the trial court, by inference only, found to exist despite the complete failure of the government's proof as to the existence of such intent. This conclusion of the trial court was reached only by the process of disregarding defendant's explanation and stating that "no other motive or purpose (intent to evade) has been suggested" (App. 34).

ARGUMENT

I.

The Denial of the Right of Defendant to Appear With Counsel at a Conference in the Intelligence Division of Internal Revenue Service, Under the Circumstances Involved Herein, Resulted in a Denial of Due Process of Law.

The Intelligence Division of the Internal Revenue Service operates through its special agents. Their functions primarily are the detection of criminal violations and the determination in the first instance of whether a criminal prosecution should or should not be recommended. As a general rule, most special agents not only seek the facts, but recommend or decline criminal prosecutions.[1] It is apparent, therefore, that an unbridled and over-zealous special agent performs the roles of investigator, prosecutor and judge in connection with alleged fraud investigations conducted by him.

Sometime during the course of the investigation by the Special Agent, the taxpayer, in appropriate cases, is notified

[1] "Taxpayers' Rights in Special Investigations," Louis Bender, 15 Institute on Federal Taxation (N. Y. U.), p. 1280.

in writing by the Chief of the Intelligence Division that the investigation of his tax liability is nearing completion and the Intelligence Division is, for reasons assigned in said notice, considering that recommendation for criminal prosecution be made against the taxpayer. Taxpayer is informed by the Chief of the Intelligence Division that he deems it appropriate to grant taxpayer a conference, before final determination of the matter is made, at which conference taxpayer is entitled to appear with counsel or any other person having knowledge of the facts.

Such procedure, as outlined briefly above, was faithfully followed in the present case. (See Defendant's Exhibit No. 2-B, App. 50.)

At the conference which is usually held as aforesaid, the taxpayer is entitled to learn what the alleged understatements are and the alleged taxes for the years involved (whether he did or did not find this out during the course of the investigation.) At this stage of his case, it is important to taxpayer to know specifically what the special agent is contending regardless of what may have been intimated or may have come to taxpayer's knowledge during the course of the investigation.[3] The conference is of extreme importance to taxpayer in that it provides him with an opportunity, through witnesses and or counsel, to offer evidence and make argument in an effort to convince the Intelligence Division that criminal prosecution of taxpayer is not warranted and should not be made.

Despite the fact that the Chief of the Intelligence Division in the present case wrote to defendant herein, and arranged for the usual final conference, as above described, in response to which defendant advised the Intelligence Division

[3] "Taxpayers' Rights in Special Investigations," Bender, *Supra*, p. 1307.

of his desire to attend. Special Agent Haspert thereafter notified defendant that the final conference would not be held, that it was cancelled. No explanation for such action was given by Haspert to defendant.

About two months later, defendant received a letter from the Regional Counsel of the U. S. Treasury Department advising defendant "that this office is in receipt of reports recommending criminal prosecution against you for various violations of the Internal Revenue laws." (Def's. Exh. No. 2-C, App. 51.)

It is quite obvious, therefore, that such recommendation for criminal prosecution was made by the Intelligence Division *prior to the completion of its investigation* of defendant's income tax liability, and after Special Agent Haspert had successfully *prevented defendant from appearing with counsel* at the conference which had been arranged for defendant by the Chief of the Intelligence Division by simply cancelling such conference.

The point urged in this argument is one of first impression in this court. Therefore, no authorities can be cited.

However, it should be remembered that since the enactment of the income tax laws in 1913 the government has been successfully collecting vast sums of money under our income tax laws. In the present case, however, the deficiencies in income tax due for the two years for which defendant was convicted were $932.00 in 1953 and $862.00 in 1954, a total for the two years of only $1,794.00. It is respectfully submitted that for the purposes of collection of taxes there is no need to curtail any of the constitutional rights of an individual.

In his dissenting opinion in *Shapiro v. United States*, 335 U.S. 1, Mr. Justice Frankfurter stated:

> "While law enforcement officers may find their duties more arduous and crime detection more difficult as society becomes more complicated, the constitutional safeguards of the individual were not designed for short-cuts in the administration of criminal justice."

Because of the flagrant and prejudicial denial of due process of law in this case, for reasons heretofore assigned, as well as for other reasons hereinafter set forth, in Argument II, as well as for other arguments made herein, it is respectfully submitted that the defendant's conviction should be reversed.

II.

Where a Special Agent of the Intelligence Division of Internal Revenue Service, Prior to the Completion of the Division's Investigation of Defendant's Tax Liability Recommends that Defendant be Criminally Prosecuted for Alleged Violations of the Matters Presumably Still Under Investigation by Him, and Thereafter the Same Special Agent Makes an Affidavit that He is Satisfied that There is Probable Cause to Believe Defendant is Guilty of Willful Failure to File Income Tax Returns, and on the Basis of Which Affidavit the U. S. Attorney Files a Criminal Information Against Defendant, as a Result of Which Criminal Information Defendant is Prosecuted and Convicted, Such Procedures Constitute a Denial of Due Process of Law and Require a Reversal of Defendant's Conviction.

The factual background of the argument made here is found in the preliminary statements in the section of this petition headed "Questions Presented," and in the "Statement of the Case," page 16 hereof.

The facts disclose an intolerable disregard of defendant's rights at the hands of agents of such an august arm of our government as the Treasury Department. There is abso-

lutely no justification for the manner in which defendant's rights were so summarily disregarded by the special agent involved herein. If special agents of the Treasury Department are permitted to continue to pursue administrative procedures such as are set forth above, we will no longer have a country ruled by law, but by the whims and arbitrary determinations of men.

Several cases cited below shed some light on the issue involved here.

For example, this court has held that

> "The guarantees of the Federal constitution respecting due process of law and trial by jury are infringed where a revenue officer, without notice, undertakes to assess a penalty for an alleged criminal act, and to enfore payment by seizure and sale of property without opportunity for a hearing of any kind." *Lipke v. Lederer*, 42 S. Ct. 549; 259 U.S. 557, (1922).

In another case, the subject of procedures in administrative agencies was dealt with in the following language of this court:

> "Where Congress entrusts administrative agencies with broad control over activities which in their detail cannot be dealt with directly by the Legislature, Congress must determine the standards of administrative action and in administrative proceedings of a quasi-judicial character in carrying out such entrusted authority, liberty and property of citizens must be protected by full and open hearing.
>
> "The right to a 'full hearing' which is essential to legal validity of administrative regulation under authority entrusted by Congress to an administrative agency, embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v.*

United States (1938) 53 S. Ct. 773; Re-hearing denied, 58 S. Ct. 999; Reversed on other grounds, 59 S. Ct. 795 and 61 S. Ct. 999.

We do not mean to represent to this court that taxpayers, as a matter of right, are entitled to a conference, or hearing, in the office of the Intelligence Division of Internal Revenue Service. To the best of our knowledge they are not so entitled as a matter of right. However, this writer can state that in fifteen years of practice, the largest part of which practice has been the handling of so-called tax fraud cases, he has never known the Intelligence Division, in the course of an investigation being conducted by it, to refrain from issuing to taxpayers in such cases the same type of letter the defendant herein received (Def's. Exh. 2-B). Moreover, text writers on the subject invariably refer to the "final conference" or the "formal questioning" wherein the taxpayer is invited to attend with counsel, if he chooses to do so. The long-standing practice of the Intelligence Division in holding such final conferences has become such a recognized and accepted step in the administrative procedure of that agency as to hold a violation of such procedure, or a deprivation of the right to such final conference, to constitute a denial of due process of law.

In a well conceived article by Warren V. Ludlam, Jr., appearing in the November, 1957 issue of the *American Bar Association Journal*, p. 1069, the subject of certain questionable and deceptive practices on the part of special agents of the Intelligence Unit is treated in an article entitled "Tax Fraud Investigations — A Plea for Constitutional Procedures."

In the head note of said article, it is stated, "The administration of a tax system that collects billions of dollars annually is a complex and perplexing job, and our traditions

require that it be done with full respect for the rights of taxpayers." Mr. Ludlam's article deals with "a small number of Internal Revenue agents who, in their zeal to collect taxes, sometimes resort to practices that, if not illegal, are certainly questionable." The author, in calling attention to the fact that in tax fraud investigations "insidious encroachments" upon basic rights of taxpayers are both easy and likely (and, as he points out, are in fact being practiced by some agents or special agents) petitions for "judicial recognition of deviations, often slight in their incipiency" and for adequate protection against the impairment of fundamental rights of taxpayers.

That it is permissible to now attack the validity of procedures invoked by the special agent during his investigation of defendant, seems to have been heretofore settled in an early case, *Hall v. Johnson*, CCA Col. (1937), 91 F. 2d 363, wherein it was stated:

> "The presumption that record of cases in which accused was convicted truly describes proper performance of various functions of officers involved may be rebutted by a showing, outside of the record, of abuse of due process in failure of judicial or administrative officer in granting to the accused his rights, of which the officer had knowledge. . . ."

Special Agent Haspert undoubtedly had knowledge of the usual practice in the office of the Intelligence Division to grant a conference to taxpayers in cases where a possible recommendation that criminal prosecution be instituted against taxpayer was being considered. Such conference was to be held, in the present case, before final decision was made. It is reasonable to infer, it seems to us, that Special Agent Haspert's report, when submitted to his superiors for action by them, or for the ratification by them of Haspert's action, was known by Haspert to be deficient,

incomplete, and possibly even misleading, in that explanations negating willfullness and other information helpful to defendant which possibly could have been given by defendant, or his counsel, at the conference which Haspert cancelled, were naturally omitted from Haspert's report as a direct result of his own action in cancelling the conference.

Pursuant to procedures of the type practiced by Special Agent Haspert, as evidenced in this case, whereunder his report of the investigation conducted by him apparently contained only those matters which he elected to include in said report since he excluded matters which might have been favorable to taxpayer, which matters taxpayer or his counsel could have produced at a conference in the Intelligence Division, taxpayers' rights would appear to be in serious jeopardy. In view of the possibilities for such arbitrary, discriminating and over-zealous action by an agent, any taxpayer who, for whatever reason, incurred the ill-will of a special agent could expect to meet a fate similar to that experienced in this case by defendant.

It is not sufficient answer to the point we are trying to make here to say that even if any short-cuts were practiced by Haspert during the course of his investigation, they were remedied during the trial of defendant when he took the stand and testified at length in his own behalf. Such is not a sufficient answer to the grievous prejudice under which defendant stood trial as a result of Haspert's over-reaching activities as heretofore enumerated.

The District Court of Maryland is a jurisdiction which is very unfavored by defendants in tax prosecutions. According to figures submitted by the Commissioner of Internal Revenue to the Subcommittee on Internal Revenue Taxation to the Committee on Ways and Means (known as

the Mills Committee), Maryland has the next to lowest incidence of acquittals, dismissals, nolle prosses, etc. in tax prosecutions of any other Federal district in the United States having an appreciable number of such prosecutions — i.e., in excess of 100. The possibilities of securing an acquittal in Maryland are less than 9%. In other jurisdictions, the possibilities of an acquittal, etc., run as high as 66%, such as in the Western District of Arkansas. (See Progress Report of said Subcommittee dated April 22, 1957, Table 16, page 214.)

It is a very serious matter to be brought to trial for a tax offense in any jurisdiction. On the record cited above it is a substantially more serious matter to be brought to trial for such offenses in Maryland than it is in some of the other jurisdictions.

We cite the above facts only to support our contention that arbitrary or discriminatory action of a special agent against a defendant in the course of a tax investigation is not per se fully and adequately remedied by virtue of the fact that the defendant stands trial and has an opportunity to make explanations in his own behalf to the court.

In the case of *McNabb, et al. v. U. S.*, 318 U.S. 332, this court, speaking through Justice Frankfurter stated that:

> "The history of our liberty has largely been the history of observance of procedural safeguards and the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law."

III.

(a) In Adopting the Opinion of the District Court, the Court of Appeals Rendered a Decision in Conflict With a Decision, or Decisions, of Other Courts of Appeals.

The burden of proof required to prove willfullness in failure to file cases has been well settled since 1933 in which year two decisions on the applicable statute were handed down — one by this court, *U. S. v. Murdock*, 290 U.S. 389 54 S. Ct. 223, decided December 11, 1933; and the other decided by the Court of Appeals for the Fifth Circuit — *Hargrove v. U. S.*, 67 F. 2d 820, on December 7, 1933.

These two opinions are regularly cited in cases involving the question of willfullness.

The Supreme Court in the *Murdock* case gave a number of definitions of the word "willful," but stated that "when used in a criminal statute, it generally means an act done with a bad purpose."

In the *Murdock* case (supra), the defendant was prosecuted and convicted of willful failure to give testimony to Revenue Agents. As to this point, the Supreme Court stated in reversing the conviction that:

> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense."

The *Hargrove* case (supra) involved a conviction for failure to file income tax returns. In reversing the lower court, the court of appeals for the Fifth Circuit stated that:

> "A specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it is of the essence."

The very same trial court which decided the present case has heretofore issued instructions in a prior case involving a prosecution for failure to file income tax returns. *Yarborough v. United States*, 230 F. 2d 56.

In the *Yarborough* case the trial court charged the jury in part as follows:

> ". . . The Jury is instructed that this is a criminal proceeding and that the word 'wilful' when used in a criminal statute means an act done with a bad purpose, or one done without justifiable excuse, or one done stubbornly, or obstinately, perversely, with a bad motive.
>
> "I instruct you that the only bad purpose or bad motive, which it is necessary for the government to prove in this case is the deliberate intention not to file returns which the defendant knew ought to have been filed, so that the government would not know the extent of the liability."

Compare the foregoing charge in the *Yarborough* case with the Court's opinion in the present case (App. 33-36). An examination of the opinion in the present case fails to disclose a single reference by the court to the necessity of the government to prove that the failure of defendant to file returns was accompanied by a "bad purpose" or a "bad motive," or any other similar purpose or motive.

The fact of the matter is that the trial court steadfastly refrained from making such a finding even when the issue was called to the court's attention by the U. S. Attorney at the very end of the sentencing. The court then stated:

> "I found that the motive which I stated in my opinion was a sufficient motive to satisfy that requirement, if such a requirement existed, and I stand by that ruling" (App. 41).

The court of appeals affirmed the *Yarborough* case, and affirmed the same trial court in the present case, despite the apparent variance in the trial court's application or interpretation of the law as expressed in its opinion in the present case.

Other courts of appeals have followed the mandate of the *Murdock* case requiring proof of bad faith or evil intent in connection with a finding of willfullness. See: *Hargrove* case, supra, Fifth Circuit; *Block v. U. S.*, 221 F. 2d 286, Ninth Circuit; *Haskell v. U. S.*, 241 F. 2d 790, Tenth Circuit.

That the trial court did not construe the applicable law as requiring proof of an evil motive in a prosecution involving willfullness under a criminal statute, as in this case, is apparent from the following statement contained in the opinion of the trial court wherein the court apparently rejects the necessity of proof of evil motive:

> "I do not think you can pull individual phrases out of an opinion, as some of your requests for instructions do, and pin down the burden on the government in this case *to prove one particular element or one particular way of proving willfullness* and say that they must prove that when they may have proved other alternative avenues of reaching the same conclusion." (App. 35-36) (Emphasis supplied.)

(b) In Adopting the Opinion of the District Court, the Court of Appeals Decided an Important Question of Federal Law Which has not Been, but Should be, Settled by This Court.

In the interests of brevity, petitioner adopts as his argument in support of the contention, set forth in this subparagraph, the contents of section (2) entitled "Question of Federal Law Presented which Should be settled by this Court" under the heading "Reasons For Granting The

(c) In adopting the Opinion of the District Court, the Court of Appeals Decided a Federal Question in a Way in Conflict With Applicable Decisions of This Court.

Petitioner's argument under this sub-paragraph was, to a considerable degree, covered in sub-paragraph (a) above with particular reference to the *Murdock* case discussed therein. An additional case decided by this court involving the issue of willfullness is *Spies v. United States*, 317 U.S. 492, 63 S. Ct. 364. The decision of the court of appeals rendered in the present case is, we respectfully submit, in conflict with this court's decision in the *Murdock* and *Spies* cases (supra).

(d) In Adopting the Opinion of the District Court, the Court of Appeals Sanctioned Such a Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

If this court rejects petitioner's arguments contained in sub-paragraphs (a) and (b) of this Question No. 3, wherein petitioner contends that he has been denied due process of law, then this court should decide, at the very minimum, we respectfully submit, that the evils set forth and complained of in said sub-paragraphs (a) and (b), and sanctioned by the trial court, constitute a sufficient departure from the accepted and usual course of judicial proceedings as to require the exercise of this court's power of supervision.

CONCLUSION

The decision in this case is one of vital importance. The protection of the government's revenues is a matter of interest and concern to all of us. But the protection and safeguarding of individual's rights against arbitrary, capricious and discriminatory action of the government's agents is also a matter of deep concern to all of us, as is the absolute necessity for the application of sound and uniform principals of law in connection with the enforcement of revenue statutes and the collection of the revenues thereunder.

The administrative procedures invoked against defendant in this case do not appear to be warranted or, in fact, authorized.

The principals of law applied by the trial court, and affirmed by the court of appeals, unquestionably constitute a variance or departure from previously existing principals of law heretofore settled by this court and followed by other courts of appeals involving the same subject matter and the facts involved in the present case do not seem to us to justify or necessitate such variance or departure.

It is respectfully prayed that this court grant the Petition for a Writ of Certiorari, as herein prayed.

Respectfully submitted,

R. Carleton Sharretts, Jr.,
1427 Munsey Building,
Baltimore 2, Maryland,
Attorney for Petitioner.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No 7448

Arold H. Ripperger,
Appellant,

versus

United States of America,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE

(Argued October 15, 1957 Decided October 21, 1957)

Before PARKER, Chief Judge, HAYNSWORTH, Circuit Judge, and THOMPSON, District Judge.

R. Carleton Sharretts, Jr., for Appellant, and Leon H. A. Pierson, United States Attorney, for Appellee.

PER CURIAM:

This is an appeal from a conviction and sentence for failure to file income tax returns for the years 1953 and 1954. Appellant is a lawyer who had filed returns for other persons and for himself for certain years prior to the years in question. His defense is that he did not have the money to pay the income taxes due for these years and thought that

he was not required to file returns when he did not have the money to pay the taxes due by him. The case was heard without a jury by the District Judge, who found that the failure of appellant to file the returns was "voluntary, purposeful, deliberate and intentional, and not accidental, inadvertent or negligent." He further found that appellant "knew that the returns ought to have been filed and that he deliberately failed to file them so that the government would not know the extent of his income and of his tax liability." With respect to intent to evade the payment of taxes, the judge made the following finding:

> "I do not think it is necessary for the government to prove in a case under 145(a) or 7203 that the defendant intended or attempted to evade the payment of taxes indefinitely or at all; but if the government did have such a burden I find that it was met in this case.
>
> "That is a natural inference from the evidence in this case, and no other motive or purpose has been suggested."

The evidence amply sustained these findings by the judge. Appellant had a gross income of more than $7500 for the year 1953 and of more than $8000 for the year 1954. His tax liability on income not reported as a result of failure to file returns was $932.42 for 1953 and $862.48 for 1954.* He was a lawyer 35 years of age who had been filing tax returns for others and must have known of the duty resting upon those with an income such as his to file tax returns. His explanation that he did not know that the law required the filing of returns when he did not have the money to pay the tax is so unreasonable that the judge was thoroughly justified in not accepting it. As we pointed out in the case of *Yarborough v. United States*, 4 Cir. 230 F. 2d 56, 61, "ignorance of a duty imposed by law may negative wilfulness in failure to perform the duty." Whether such

* A small amount had been withheld from salary which he had earned during these years as organist at a church and had been paid by the employer.

wilfulness was negatived here was a question of fact for the trial judge, who heard the testimony in the case, including that of appellant, and concluded that not only wilfulness in the failure to file the return but also an intent to evade taxes had been established. The judge's statement at the time of conviction and sentence shows that he was applying the principles of law properly applicable in the case. *Yarborough v. United States, supra; Haskel v. United States*, 10 Cir. 241 F. 2d 790; *United States v. Murdock*, 290 U.S. 389; *Spies v. United States*, 317 U.S. 492.

Affirmed.